No. 06-1210

Supreme Court, U.S.
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In The

Supreme Court of the United States

GENERAL ELECTRIC COMPANY,

Petitioner,

v.

COMMISSIONER, NEW HAMPSHIRE DEPARTMENT OF REVENUE ADMINISTRATION,

Respondent.

On Petition For A Writ Of Certiorari To The Supreme Court Of New Hampshire

RESPONDENT'S BRIEF IN OPPOSITION

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COUNTER-STATEMENT OF THE QUESTION PRESENTED

Whether N.H. Rev. Stat. Ann. § 77-A:4, IV facially discriminates against foreign commerce by permitting a deduction for dividends received from foreign corporations doing business in New Hampshire, while denying a deduction for dividends received from foreign corporations not doing business in New Hampshire.

PARTIES TO THE PROCEEDING

The parties to the proceeding are only those stated in the caption.

TABLE OF CONTENTS

	Page
RESPONDENT'S BRIEF IN OPPOSITION	1
SUMMARY OF REASONS TO DENY THE PETITION	1
STATEMENT OF THE CASE	2
A. Petitioner's Statement Of The "Question Presented" Is Not The Question That Was Presented To The Lower Court	2
B. The New Hampshire Business Profits Tax Statute	3
1. New Hampshire Uses The Water's Edge Method Of Apportionment	4
2. Because Foreign Members Of The Unitary Business Are Excluded From The Water's Edge System, Their Income Is Excluded From The Combined Report And Not Subject To Tax	4
3. Calculating Taxable Business Profits Of A Unitary Business	5
C. Specific Facts Pertaining To GE	6
D. N.H. Rev. Stat. Ann. § 77-A:4, IV Allows A Deduction For Business Profits Which Have Already Been Subject To Tax	8
ARGUMENT	9
I. Petitioner Failed To Establish That The New Hampshire Business Profits Tax Facially Discriminates Against Foreign Commerce In Violation Of The Foreign Commerce Clause	9
A. The Established Standards	10

TABLE OF CONTENTS – Continued

Page

B. The New Hampshire Supreme Court Applied The Standards Established By This Court And Correctly Held That Petitioner Did Not Show That Facial Discrimination Exists 11

1. The Statute Does Not Discriminate And Provides The Same "Taxing Symmetry" And Parity Upheld In Other State Court Decisions Which Rely On *Kraft* 12

2. The New Hampshire Supreme Court Correctly Applied The Holdings Of The *Kraft* Decision In This Case..... 14

3. The New Hampshire Supreme Court's Decision Does Not Conflict With This Court's Decisions In *Fulton* And *Boston Exchange* 16

II. The New Hampshire Supreme Court's Decision Does Not Conflict With Decisions Of Other State Appellate Courts..... 19

III. Petitioner's Claim Is Purely Hypothetical, And It Has Not Been Harmed 24

CONCLUSION 26

BEST AVAILABLE COPY

TABLE OF AUTHORITIES

Page

UNITED STATES SUPREME COURT CASES

Bacchus Imports Ltd. v. Dias, 468 U.S. 263 (1984)..... 25

Barclays Bank PLC v. Franchise Tax Board, 512 U.S. 298 (1994)..... 10

Boston Exchange v. State Tax Commission, 429 U.S. 318 (1977).....16, 18, 19

Complete Auto Transit, Inc. v. Brady, 430 U.S. 274 (1977).....16, 17

Fulton Corp. v. Faulkner, 516 U.S. 325 (1996) 16, 17, 22, 23, 25

General Motors Corp. v. Tracy, 519 U.S. 278 (1997) ...16, 25

Gregg Dyeing Co. v. Query, 286 U.S. 472 (1932) 24

Halliburton Oil Well Cementing Co. v. Reily, 373 U.S. 64 (1963).....11

Hughes v. Oklahoma, 441 U.S. 322 (1979)..... 10

Kraft General Food, Inc. v. Iowa Dept. of Revenue, 505 U.S. 71 (1992).....10, 14, 15, 20

Maryland v. Louisiana, 451 U.S. 725 (1981)..... 10

Quill Corp. v. North Dakota, 504 U.S. 298 (1992)..... 10

South-Central Bell Telephone Co. v. Alabama, 526 U.S. 160 (1999).....11

STATE CASES

Appeal of Morton Thiokol, Inc., 254 Kan. 23 (1993).....*passim*

Bernard Egan & Co. v. State, Dept. of Rev., 769 So.2d 1060 (Fla. Dist. Ct. App. 2000), *cert. denied*, 534 U.S. 995 (2001).....21

TABLE OF AUTHORITIES – Continued

Page

Caterpillar, Inc. v. Commissioner of Revenue, 568 N.W.2d 695 (Minn. 1997), *cert. denied*, 522 U.S. 1112 (1998) 16, 21

Ceridian Corp. v. Franchise Tax Bd., 102 Cal. Rptr. 2d 611 (Cal. App. 2000) 20, 22

Conoco, Inc. v. Taxation & Revenue Dept., 122 N.M. 736, 931 P.2d 730 (1996), *cert. denied*, 521 U.S. 1112 (1997) 21

D.D.I., Inc. v. State ex rel. Clayburgh, 657 N.W.2d 228 (N.D. 2003) 21, 22

E.I. Du Pont de Nemours & Co. v. State Tax Assessor, 675 A.2d 82 (Me. 1996) 13, 20, 21

Emerson Elec. Co. v. Tracy, 90 Ohio St.3d 157, 735 N.E.2d 445 (2000) 21

Farmer Bros. Co. v. Franchise Tax Bd., 134 Cal. Rptr. 2d 390 (Cal. App. 2003), *rev. denied* (Cal. Aug. 27, 2003), *cert. denied*, 540 U.S. 1178 (2004) 20, 23, 24

First Financial Group of New Hampshire, Inc. v. State, 121 N.H. 381 (1981) 12

Fujitsu IT Holdings, Inc. v. Franchise Tax Bd., 15 Cal. Rptr. 3d 473 (Cal. App. 2004) 20

General Motors v. Franchise Tax Bd., 16 Cal. Rptr. 3d 41 (Cal. App. 2004), *aff'd in part and rev'd in part on other grounds*, 47 Cal. Rptr. 3d 233 (Cal. 2006) 20, 23, 24

General Electric Company, Inc. v. Commissioner, New Hampshire Department of Revenue Administration, 914 A.2d 246 (2006) ..... *passim*

Hutchinson Technology v. Com'r of Revenue, 698 N.W.2d 1 (Minn.2005) 21

TABLE OF AUTHORITIES – Continued

Page

NEW HAMPSHIRE STATUTES

N.H. Rev. Stat. Ann. § 77-A:1, I 3, 13
N.H. Rev. Stat. Ann. § 77-A:1, IV 5
N.H. Rev. Stat. Ann. § 77-A:1, VI 12
N.H. Rev. Stat. Ann. § 77-A:1, XIII 3
N.H. Rev. Stat. Ann. § 77-A:1, XIV 3, 5, 22
N.H. Rev. Stat. Ann. § 77-A:1, XV 3, 4, 5
N.H. Rev. Stat. Ann. § 77-A:1, XVI 3, 4, 5
N.H. Rev. Stat. Ann. §77-A:1, XIX 4, 5, 7
N.H. Rev. Stat. Ann. § 77-A:2 (2003) 6
N.H. Rev. Stat. Ann. § 77-A:3, I (2003) 5, 12
N.H. Rev. Stat. Ann. § 77-A:3, II(b) (2003) 6, 8, 13
N.H. Rev. Stat. Ann. § 77-A:3, II(b)(6) 6
N.H. Rev. Stat. Ann. § 77-A:4, IV ..... *passim*

NEW HAMPSHIRE ADMINISTRATIVE RULES

N.H. Code of Admin. Rules, Rev. 301.02 5
N.H. Code of Admin. Rules, Rev. 301.10(b) 5
N.H. Code of Admin. Rules, Rev. 311.24(a) 6
N.H. Code of Admin. Rules, Rev. 311.24(f) 6

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RESPONDENT'S BRIEF IN OPPOSITION

Respondent respectfully requests that this Court deny the Petition for a Writ of *Certiorari* (the "Petition") seeking review of the decision of the New Hampshire Supreme Court in this case. While there is not yet an official reported version of the decision below, it is reported as *General Electric Co. v. Commissioner, New Hampshire Department of Revenue Administration*, at 914 A.2d 246 (2006).[1] ("*General Electric* (NH)").

SUMMARY OF REASONS TO DENY THE PETITION

This Court should deny the Petition because the lower court decision does not warrant review by this Court for several reasons. First, Petitioner failed to establish that the New Hampshire Business Profits Tax discriminates against foreign commerce in violation of the Foreign Commerce Clause. Second, the lower court correctly applied the Commerce Clause standards as set forth in the decisions of this Court. Third, the lower court's decision that the New Hampshire taxing regime does not favor in-state activity over foreign commerce is consistent with other state court decisions. Finally, this case should not be reviewed because the Petitioner's claims are purely hypothetical, and it has not been harmed.

[1] Petitioner has included a copy of the New Hampshire Supreme Court's decision in its Appendix beginning at 1a. In this Brief, Respondent will cite to items included in Petitioner's Appendix by referring to "Petitioner's App." and then the page number.

STATEMENT OF THE CASE

Respondent, the New Hampshire Department of Revenue Administration (the "Department"), submits the following additional information to supplement and correct Petitioner's statements of fact, descriptions of New Hampshire's business tax system, and the proceedings below.

A. Petitioner's Statement Of The "Question Presented" Is Not The Question That Was Presented To The Lower Court.

The Question Presented by Petitioner is incorrect in two respects. First, the Question Presented by Petitioner is not the issue as it was presented to the lower court. Second, Petitioner's allegation that the New Hampshire statute at issue grants a dividends received deduction "only to the extent the underlying corporation engages in in-state business activity[ ]" is incorrect. Petition at 2.

With regard to the first point, the lower court noted that "the issue on appeal, which is consistent with [Petitioner's] argument below, focuses specifically upon whether [N.H. Rev. Stat. Ann. §] 77-A:4, IV facially discriminates against parents of dividend-paying foreign subsidiaries which do not conduct business in the state." *General Electric* (NH), Petitioner's App. at 9a-10a. As identified by the lower court, the "central issue" in the case was "[w]hether [N.H. Rev. Stat. Ann. §] 77-A:4, IV facially discriminates against foreign commerce by permitting a deduction for dividends received from foreign corporations doing business in New Hampshire, while denying a deduction for dividends received from foreign corporations not doing business in New Hampshire. *General Electric* (NH), Petitioner's App. at 12a.

Second, Petitioner's claim that "the tax regime at issue here grants a dividends received deduction to corporate shareholders of foreign corporations *only to the extent the underlying corporation engages in in-state business* activity[]" (Petition at 2 (emphasis added)) is inaccurate. N.H. Rev. Stat. Ann. § 77-A:4, IV allows a parent corporation to take a deduction for dividends received from its corporate subsidiaries when the gross business profits of the subsidiaries have already been subject to tax in New Hampshire. *General Electric* (NH), Petitioner's App. at 5a. A corporation can have significant activity in a state but may not have income from its operations due to operating losses. Therefore, New Hampshire's dividends received deduction is not based on the extent of a subsidiary's in-state activity; rather, it is based on the income that has previously been subject to tax.

B. The New Hampshire Business Profits Tax Statute.

New Hampshire taxes the income of a unitary business by apportioning the income of the unitary business to New Hampshire using the combined reporting method. *General Electric* (NH), Petitioner's App. at 3a (*citing* N.H. Rev. Stat. Ann. § 77-A:1, XIII, XV, XVI (2003)). A "unitary business" is "one or more related business organizations engaged in business activity both within and without this state among which there exists a unity of ownership, operation, and use; or are interdependent in their functions." *General Electric* (NH), Petitioner's App. at 3a; N.H. Rev. Stat. Ann. § 77-A:1, XIV.

1. New Hampshire Uses The Water's Edge Method Of Apportionment.

New Hampshire uses the water's edge method of apportionment, which limits the State's taxing authority to the United States borders for apportioning business activity to New Hampshire. N.H. Rev. Stat. Ann. § 77-A:1, XV. The domestic members (i.e., within the United States) of the unitary business comprise what is known as the "water's edge combined group." *General Electric* (NH), Petitioner's App. at 3a (*citing* N.H. Rev. Stat. Ann. § 77-A:1, XV). The income of all the domestic members of the water's edge combined group is aggregated in the combined report. *General Electric* (NH), Petitioner's App. at 3a (*citing* N.H. Rev. Stat. Ann. § 77-A:1, XVI).

2. Because Foreign Members Of The Unitary Business Are Excluded From The Water's Edge System, Their Income Is Excluded From The Combined Report And Not Subject To Tax.

General Electric Company ("GE" or "Petitioner") has unitary foreign subsidiaries which satisfy the definition of "overseas business organization[s]"[2] (hereinafter referred to as "foreign subsidiaries" or "foreign members") *General Electric* (NH), Petitioner's App. at 4a. Those foreign subsidiaries paid dividends to members of the water's edge

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[2] "Overseas business organizations" are business organizations "with 80 percent or more of the average of their payroll and property assignable to a location outside the 50 states and the District of Columbia." *General Electric* (NH), Petitioner's App. at 3a (*citing* N.H. Rev. Stat. Ann. § 77-A:1, XIX (2003)).

group, and those are the foreign dividends at issue in this case. *General Electric* (NH), Petitioner's App. at 4a.

Although foreign subsidiaries are not considered part of the water's edge combined group,[3] they may still qualify as a unitary member. *Id.* at 3a (*citing* N.H. Rev. Stat. Ann. § 77-A:1, XIV, XV). In the water's edge system, the income of those foreign members of the unitary business is excluded from the combined report. *General Electric* (NH), Petitioner's App. at 3a (*citing* N.H. Rev. Stat. Ann. § 77-A:1, XV); N.H. Rev. Stat. Ann. § 77-A:1, XIX.

3. Calculating Taxable Business Profits Of A Unitary Business.

Once the net income from all members of the water's edge group is combined, any domestic "inter-group activity," such as a payment of dividends, is excluded in determining the "gross business profits" of the group. *General Electric* (NH), Petitioner's App. at 4a (*citing* N.H. Code of Admin. Rules, Rev. 302.10(b) *and* N.H. Rev. Stat. Ann. § 77-A:3, I (2003)). The "gross business profits" are then apportioned to the State using three factors: property, payroll, and sales. *General Electric* (NH), Petitioner's App. at 4a (*citing* N.H. Rev. Stat. Ann. § 77-A:3, I). The resulting amount constitutes the "New Hampshire water's edge taxable business profits" of the group. *General Electric* (NH), Petitioner's App. at 4a (*citing* N.H. Rev. Stat. Ann. § 77-A:1, IV, XV, XVI *and* N.H. Code of Admin. Rules, Rev. 301.02).

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[3] A "water's edge combined group" is "a group of business organizations . . . operating a unitary business, except for overseas business organizations." N.H. Rev. Stat. Ann. § 77-A:1, XV.

In this calculation, the dividends paid by a foreign subsidiary to a member of the water's edge combined group are initially excluded from the group's gross business profits and are apportioned separately to determine the "New Hampshire foreign dividends taxable business profits." *General Electric* (NH), Petitioner's App. at 4a (*citing* N.H. Rev. Stat. Ann. § 77-A:3, II(b) (2003) *and* N.H. Admin. Code of Rules, Rev. 311.24(a), (f)). The "New Hampshire foreign dividends taxable business profits" are then added to the "New Hampshire water's edge taxable business profits" to produce "New Hampshire taxable business profits." *General Electric* (NH), Petitioner's App. at 4a (*citing* N.H. Rev. Stat. Ann. § 77-A:3, II(b)(6)). The applicable tax rate is then applied, resulting in the tax due. *General Electric* (NH), Petitioner's App. at 4a (*citing* N.H. Rev. Stat. Ann. § 77-A:2 (2003)). In this manner, dividends paid by a foreign member of the unitary group to the domestic members are apportioned to New Hampshire and taxed. *General Electric* (NH), Petitioner's App. at 4a.

C. Specific Facts Pertaining To GE.

The lower court recognized that Petitioner posed "a hypothetical situation[]" to the court for adjudication.[4] *General Electric* (NH), Petitioner's App. at 10a. The court noted that it was, therefore, uncertain how the state

[4] The Respondent objects to Petitioner's statement that the settlement agreements preserved any specific constitutional issue for appeal. *See* Petition at 7. The Respondent's position throughout this litigation has been that pursuant to the settlement agreements, what was termed "the foreign dividend issue" in the settlement agreements could be *litigated* by the parties because the parties could not reach agreement on that issue.

taxing regime, including N.H. Rev. Stat. Ann. § 77-A:4, IV "would operate if it did[,]" but the court nevertheless accepted Petitioner's hypothetical[5] and reached the merits of the issue posed, reasoning that a facial attack on N.H. Rev. Stat. Ann. § 77-A:4, IV raised broad constitutional concerns and that the issue was likely to come before the court again. *General Electric* (NH), Petitioner's App. at 10a.

The income of GE's foreign subsidiaries was excluded from the calculation of GE's tax liability for the tax years because each was an overseas business organization within the meaning of N.H. Rev. Stat. Ann. § 77-A:1, XIX. *Id.* at 4a. None of GE's foreign affiliates was domiciled in or transacted business in New Hampshire during the tax years at issue (1990-1999). *Id.* at 2a. Accordingly, none of GE's foreign subsidiaries were subject to taxation in New

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[5] It should be noted that Petitioner's hypothetical claim of discrimination was found to have been based on its incorrect interpretation of N.H. Rev. Stat. Ann. § 77-A:4, IV. Under Petitioner's interpretation of the statute, N.H. Rev. Stat. Ann. § 77-A:4, IV allowed a full deduction of all foreign dividends paid to the member of the water's edge group, even if they had not already been subject to tax. *General Electric* (NH), Petitioner's App. at 11a. The lower court rejected this interpretation of the statute, finding that "the statutory construction urged by GE ... would allow a 'hyper-deduction' regardless of the amount of the tax paid in New Hampshire" and that such an interpretation yields an "absurd result." *Id.* The lower court opined that if the statute operated as Petitioner suggested, it would possibly "run afoul of the Commerce Clause[.]" *Id.* The lower court agreed with the Respondent, however, and found that the deduction allowed under N.H. Rev. Stat. Ann. § 77-A:4, IV, by its terms, is only up to the amount of gross business profits already taxed, and that the purpose of the deduction is "to prevent double taxation on the *identical* gross business profits" of a subsidiary and its parent. *Id.* (emphasis and quotation in opinion).

Hampshire. *Id.* at 2a.[6] The dividends paid to GE by its foreign subsidiaries, however, remain subject to an apportioned tax because they constitute income to the water's edge combined group. N.H. Rev. Stat. Ann. § 77-A:3, II(b).

D. N.H. Rev. Stat. Ann. § 77-A:4, IV Allows A Deduction For Business Profits Which Have Already Been Subject To Tax.

Petitioner sought to avoid taxation of the foreign dividends, claiming a right to a deduction pursuant to N.H. Rev. Stat. Ann. § 77-A:4, IV, but the Respondent denied the request because the foreign subsidiaries did not transact business in the State, and therefore, their gross business profits were not subject to tax in New Hampshire. *General Electric* (NH), Petitioner's App. at 2a.

Dividends received from foreign subsidiaries which do not conduct business in the State and, accordingly, pay no business profits tax, do not qualify for the deduction of N.H. Rev. Stat. Ann. § 77-A:4, IV. *Id.* at 5a. N.H. Rev. Stat. Ann. § 77-A:4, IV permits a parent corporation to take a deduction for dividends received from its corporate subsidiaries when the gross business profits of the subsidiaries have already been subject to tax in New Hampshire. *Id.* at 2a.

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[6] Petitioner's suggestion, therefore, that its foreign subsidiaries "were each treated on a separate company basis, both with respect to their own [business profits tax] obligations and with respect to transactions with members of GE's domestic combined group" (Petition at 7) is misleading to the extent that it implies that these foreign subsidiaries were subject to separate entity taxation, or any taxation at all. None of GE's foreign subsidiaries did any business within New Hampshire, and they therefore did not even file tax returns in New Hampshire. *General Electric* (NH), Petitioner's App. at 8a; Petition at 7.

N.H. Rev. Stat. Ann. § 77-A:4, IV has been used by corporations with subsidiaries that file separately, and not under the combined reporting method. *Id.* at 5a. The statute allows a deduction for dividends paid to a taxable parent by subsidiaries that conducted business in the State and were therefore subject to a separate business profits tax.[7] *Id.* at 5a. The dividends received from foreign subsidiaries that do not conduct business in the State, and accordingly pay no business profits tax, do not qualify for the deduction, *id.* at 250 – where no tax is imposed, there is no deduction allowed, N.H. Rev. Stat. Ann. § 77-A:4, IV.

ARGUMENT

I. Petitioner Failed To Establish That The New Hampshire Business Profits Tax Facially Discriminates Against Foreign Commerce In Violation Of The Foreign Commerce Clause.

Petitioner alleges that the dividends received deduction of the business profits tax facially discriminates against foreign commerce. Its claim rests entirely upon the non-discrimination component of Foreign Commerce Clause jurisprudence. Petitioner, however, does not apply the standards established by this Court for determining whether a tax discriminates against foreign commerce.

[7] Petitioner's assertion that New Hampshire's taxing regime imposes tax liability on domestic combined groups and foreign corporations as separate entities is misleading, *see* Petition at 18, because it implies that foreign corporations are the only entities that must file separate returns. In fact many domestic entities, including entities that are related to but not unitary with members of combined groups, file as separate entities.

The court below applied the proper standards and correctly determined that Petitioner did not show that discrimination exists.

A. The Established Standards.

The non-discrimination component of Foreign Commerce Clause jurisprudence has been considered and applied in *Barclays Bank PLC v. Franchise Tax Board*, 512 U.S. 298, 310-311 (1994) (*citing Complete Auto Transit v. Brady*, 430 U.S. 274, 279 (1977)). The non-discrimination component prohibits "taxes that pass an unfair share of the tax burden onto interstate [foreign] commerce," *Quill Corp. v. North Dakota*, 504 U.S. 298, 313 (1992), or taxes that "systematically 'overtax[]' foreign corporation." *Barclays*, 512 U.S. at 314. A law is discriminatory if it taxes interstate commerce more heavily than domestic commerce. *See Kraft General Foods, Inc. v. Iowa Department of Revenue*, 505 U.S. 71, 79-80 (1992).

In determining whether foreign commerce is more heavily taxed, a court must consider "the operation of other provisions of the . . . statute" under review. *Kraft*, 505 U.S. at 80-81 (quoting amicus brief of the United States with approval); *see also Maryland v. Louisiana*, 451 U.S. 725, 756 (1981) (a tax must be evaluated in light of other provisions of the tax scheme). Further, this Court has specifically stated that the correct comparison to be made in cases like this one is between taxpayers who are the "most similarly situated." *See Kraft*, 505 U.S. at 80 n.23. Finally, the burden of showing that foreign commerce is more heavily taxed is on the party claiming discrimination. *See Hughes v. Oklahoma*, 441 U.S. 322, 336 (1979). This Court's standards are well-established and have been

recently considered and applied by this Court. *See South-Central Bell Telephone Co. v. Alabama*, 526 U.S. 160 (1999). There is no need to revisit them.

B. The New Hampshire Supreme Court Applied The Standards Established By This Court And Correctly Held That Petitioner Did Not Show That Facial Discrimination Exists.

The New Hampshire Supreme Court correctly determined that Petitioner did not show that discrimination exists. Following the decisions of this Court, the New Hampshire Supreme Court properly recognized that this Court requires an analysis of the aggregate tax burden when reviewing a claim of an allegedly discriminatory tax which violates the Commerce Clause. *General Electric* (NH), Petitioner's App. at 17a (*citing Halliburton Oil Well Cementing Co. v. Reily*, 373 U.S. 64, 69 (1963) (stating that "a proper analysis must take the whole scheme of taxation into account.")). The lower court, therefore, assessed the State's taxing scheme as a whole and evaluated the "aggregate tax imposed upon a unitary business[.]". *General Electric* (NH), Petitioner's App. at 17a.

When all of the provisions of the business profits tax statute are taken into account, Petitioner cannot show facial discrimination. While a combined group with a foreign subsidiary with operations in New Hampshire may be entitled to a limited dividends received deduction, the unitary foreign subsidiary will be subject to an apportioned tax on its entire net income. When both the apportioned tax of the foreign subsidiary's net income and the limited dividend received deduction are considered, it is not possible to establish that the business profits tax will

be systematically higher for the combined group and its foreign subsidiary without operations in New Hampshire than for a combined group and its foreign subsidiary with operations in New Hampshire.

1. The Statute Does Not Discriminate And Provides the Same "Taxing Symmetry" and Parity Upheld in Other State Court Decisions which Rely on *Kraft*.

The lower court properly found that New Hampshire's business profits tax statute does not discriminate. *General Electric* (NH), Petitioner's App. at 17a. A foreign subsidiary, whether unitary or not, conducting business in New Hampshire is subject to the business profits tax and would be required to pay an apportioned tax upon its profits attributable to the State. *General Electric* (NH), Petitioner's App. at 18a; N.H. Rev. Stat. Ann. § 77-A:1, VI; N.H. Rev. Stat. Ann. § 77-A:3, I. It would do so through filing a separate return. Any dividends paid to a unitary parent corporation doing business within the state, which normally would be apportioned and included in the parent corporation's taxable business profits, may be deducted pursuant to N.H. Rev. Stat. Ann. § 77-A:4, IV up to the amount of business profits already taxed. *General Electric* (NH), Petitioner's App. at 18a (*citing* N.H. Rev. Stat. Ann. § 77-A:4, IV; *First Financial Gr. of N.H. v. State*, 121 N.H. 381, 385 (1981). Such ensures that the income of the business entity is taxed only once. *Id.*

On the other hand, the income of a unitary foreign subsidiary that does not conduct business in New Hampshire is not included in the tax base of the combined group and does not file a separate return, so its income is not

taxed. *General Electric* (NH), Petitioner's App. at 18a (*citing* N.H. Rev. Stat. Ann. § 77-A:1, I). Any dividends paid to a unitary combined group with operations in New Hampshire, however, constitute income to the combined group (N.H. Rev. Stat. Ann. § 77-A:3, II(b)), and they are accordingly subject to an apportioned tax. *General Electric* (NH), Petitioner's App. at 18a. Because that dividend income has only been taxed once, it cannot be deducted under N.H. Rev. Stat. Ann. § 77-A:4, IV. *Id.*; N.H. Rev. Stat. Ann. § 77-A:4, IV (providing for a deduction "to prevent double taxation . . . "). Consequently, the lower court found that New Hampshire's statute provides the "taxing symmetry" found in *E.I. Du Pont de Nemours v. State Tax Assessor*, 675 A.2d 82 (Me. 1996), and the "balancing the burdens" formula affirmed in *Appeal of Morton Thiokol*, 254 Kan. 23 (1993). *General Electric* (NH), Petitioner's App. at 18a.

Similarly, the Kansas Supreme Court upheld its state's combined reporting tax formula which allowed in-state corporations to deduct dividends received from domestic subsidiaries, but included dividends received from foreign subsidiaries in the calculation of taxable income. *Appeal of Morton Thiokol, Inc.*, 254 Kan. at 36-37. The court held that the formula effectively "balanc[ed] the [tax] burdens" of each entity and that "the aggregate tax imposed by [the state] on a unitary business with a domestic subsidiary would not be less burdensome than that imposed by [the state] on a unitary business with a foreign subsidiary" because the state would tax the income of the domestic subsidiary, but would only tax the dividend of the foreign subsidiary. *Id.* at 38.

2. The New Hampshire Supreme Court Correctly Applied The Holdings Of The *Kraft* Decision In This Case.

Petitioner asserts that the lower court analyzed New Hampshire's taxing regime as a whole and looked at the aggregate tax imposed upon a unitary business. Petition at 10. Petitioner argues that the lower court should have ignored any additional tax that would be paid by a foreign subsidiary as a result of its operations in New Hampshire and instead focused solely on the difference in the tax on foreign dividends between a combined group with a foreign subsidiary with operations in New Hampshire and a combined group with a foreign subsidiary without operations in New Hampshire. Petitioner's arguments are not grounded in this Court's decision in *Kraft* or the decisions of State courts that have followed it. *See Morton Thiokol*, 254 Kan. 23 (1993). In fact, Petitioner's arguments on this issue are predicated upon taking the ubiquitous footnote 23 of the *Kraft* decision completely out of context.

Reading the entire *Kraft* decision leads to the conclusion that the determination of the most similarly situated taxpayers and the appropriate comparison depends upon the type of discrimination being alleged. In *Kraft*, the taxpayer claimed that Iowa's single-entity reporting system, which allowed a deduction for dividends received from a domestic subsidiary but did not allow for a deduction for dividends received from a foreign subsidiary, favored domestic commerce over foreign commerce. *See Kraft*, 505 U.S. at 74, n.10. Iowa countered that any claimed discrimination did not benefit Iowa business. Additionally, the United States, as amicus, advanced several arguments that Iowa's different treatment of dividends from foreign and domestic subsidiaries did not

amount to prohibited discrimination against foreign commerce, including the argument that there is no discrimination because if the aggregate of the federal tax and the tax imposed by other states is taken into consideration, Iowa's scheme does not favor business in the United States. *Id.* at 79-80.

The *Kraft* Court rejected the arguments of both Iowa and the amicus United States, and found that the appropriate comparison is between a corporation with a domestic subsidiary that did no business in Iowa and a domestic corporation with a foreign subsidiary. *Id.* at 80. In *Kraft*, the claimed discrimination was between domestic commerce and foreign commerce, even though there was no direct benefit to Iowa business. This Court held that the absence of a local benefit did not exempt such discrimination. *Id.* at 79. Therefore, in that case, it was not appropriate to aggregate the tax paid by a domestic corporation and its domestic subsidiary that did business in Iowa to determine if domestic commerce was being treated more favorably than foreign commerce. This is because domestic commerce on the whole was being favored over foreign commerce even though a domestic corporation with a domestic subsidiary that did business in Iowa was not necessarily being favored over foreign commerce.

Unlike the discrimination in *Kraft*, the discrimination that Petitioner alleges is discrimination between New Hampshire commerce and foreign commerce. It is Petitioner's contention that N.H. Rev. Stat. Ann. § 77-A:4, IV provides an advantage to foreign subsidiaries if they conduct operations in New Hampshire, thus favoring New Hampshire commerce. Therefore, in this case, it is appropriate to compare the aggregate business profits tax of a combined group and its foreign subsidiary with operations

in New Hampshire with the business profits tax of a combined group with a foreign subsidiary with no operations in New Hampshire. As the discrimination that is alleged is based upon a claimed benefit by operating in New Hampshire, the lower court correctly considered the attendant cost to obtain that benefit. When both the cost and the benefit are considered together, it is clear that there is, in fact, no commercial advantage for a foreign subsidiary to have operations in New Hampshire and no discrimination against foreign commerce.

3. The New Hampshire Supreme Court's Decision Does Not Conflict With This Court's Decisions In *Fulton* and *Boston Exchange*.

The purpose of the dormant commerce clause is to "protect markets and participants in markets, not taxpayers as such." *General Motors Corp. v. Tracy*, 519 U.S. 278, 300 (1997). When deciding challenges based on facial discrimination, the Supreme Court still examines the burdens on interstate commerce rather than simply determining whether intrastate, interstate, and foreign commerce receive identical treatment under a state's tax law. *Caterpillar, Inc. v. Commissioner of Revenue*, 568 N.W.2d 695 (Minn. 1997), *cert. denied*, 118 S.Ct. 1043 (1998). The anti-discrimination component of the *Complete Auto* test is best viewed as promoting equal treatment of domestic and foreign commerce, but not identical treatment of all taxpayers engaged in domestic and foreign commerce. *Id.* (citation omitted).

In *Fulton*, North Carolina assessed an intangible property tax against shareholders of corporate stock. In determining the value of the stock on which the tax was assessed, a deduction was allowed equal to the percentage of the corporation's income subject to taxation in North Carolina. *Fulton Corp. v. Faulkner*, 516 U.S. 325, 328 (1996). This Court found that the unmistakable discrimination in *Fulton* clearly violated the anti-discrimination prong of the *Complete Auto* test. *Id.* at 333. The discrimination affected the ability of corporations to raise capital in the North Carolina market because those corporations that engaged in more activity in North Carolina were given a clear competitive advantage. *Id.*

The lower court correctly found that *Fulton* was not analogous to the present case. The deduction against North Carolina's intangible property tax was available against the stock of all corporations to the extent that their income was taxable in that state. The deduction allowed by N.H. Rev. Stat. Ann. § 77-A:4, IV, however, is not available to all stockholders of corporations, but only to parents of affiliates that own 80% of a subsidiary and only to the extent that the subsidiary has paid business tax on the same income distributed by the dividend. *General Electric* (NH), Petitioner's App. at 6a and 8a. Because the dividend deduction is only available to parents of subsidiaries, the dividend payers are not competing with other corporations for capital in New Hampshire the way that the corporations were competing for capital in North Carolina.

The issue that must be analyzed in the context of the parent and its unitary subsidiary is whether the taxing regime discriminates against parents with unitary subsidiaries with investments in other states or countries as

opposed to parents with unitary subsidiaries with investments in the taxing state. The lower court used the correct analysis by focusing on the aggregate tax paid by a parent and a unitary subsidiary operating in New Hampshire as compared to the aggregate tax paid by a parent and a unitary subsidiary not operating in New Hampshire. *General Electric* (NH), Petitioner's App. at 18a. While the two did not receive identical treatment, the New Hampshire Supreme Court was correct in its determination that there is no differential treatment that benefits the former and burdens the latter, nor is the latter taxed more heavily than the former. *Id.*

The lower court also correctly found that New Hampshire's taxing regime did not discriminate in a way that was analogous to *Boston Exchange*. *General Electric* (NH), Petitioner's App. at 18a. In *Boston Exchange*, this Court found that the New York stock transfer tax, which taxed out of state stock transfers by nonresidents more heavily than transfers that utilized a stock exchange located in New York, provided a direct commercial advantage to stock exchanges located in New York at the expense of non-New York stock exchanges. *Boston Exchange v. State Tax Commission*, 429 U.S. 318, 332 (1977). This Court described how New York used its power to tax to coerce business operations to be performed in the State by "foreclosing tax-neutral decisions." 429 U.S. at 336.

The lower court correctly found that the taxing regime as a whole did not provide a parent with a foreign subsidiary with operations in New Hampshire an advantage over a parent with a foreign subsidiary without operations in New Hampshire. *General Electric* (NH), Petitioner's App. at 18a. While N.H. Rev. Stat. Ann. § 77-A:4, IV may provide a limited deduction for dividends received from a

subsidiary with operations in New Hampshire, the foreign subsidiary's income is also subject to tax, unlike the foreign subsidiary without operations in New Hampshire. Thus, the decision whether to have a foreign subsidiary conduct operations in New Hampshire is a tax-neutral one. Unlike the nonresidents selling stocks in *Boston Exchange*, the corporations considering whether to have their foreign subsidiaries located in New Hampshire will not receive a net tax benefit if the operations are in the taxing state. Nothing in the record shows that foreign commerce is taxed more heavily than intrastate commerce based upon the lower court's interpretation of how N.H. Rev. Stat. Ann. § 77-A:4, IV operates. Consequently, this Court should deny *certiorari*.

II. The New Hampshire Supreme Court's Decision Does Not Conflict With Decisions Of Other State Appellate Courts.

There is no conflict among the lower courts, despite Petitioner's assertions to the contrary. Without exception, the decisions that Petitioner claims to be in conflict with the New Hampshire Supreme Court's decision did not involve deductions for foreign dividends received from unitary subsidiaries in the context of water's edge combined reporting tax regimes. In fact, those state appellate courts which have examined dividend received deductions in the context of a water's edge combined reporting statutory framework, have found statutes very similar to New Hampshire's to be constitutionally sound. *See, e.g., Morton Thiokol*, 254 Kan. 23 (1993) (dividend received deduction allowed for domestic subsidiaries but denied to foreign subsidiaries permissibly avoids double taxation of domestic subsidiary where its income is also included and taxed

in the unitary combined income) *and E.I. Du Pont de Nemours & Co. v. State Tax Assessor*, 675 A.2d 82, 87-88 (Me. 1996) (deduction of domestic subsidiary dividends but not foreign subsidiary dividends from parent's income does not violate Foreign Commerce Clause because deduction provides "taxing symmetry" where domestic subsidiary's income is included in unitary combined income while income of foreign subsidiary is not).

Petitioner argues that the New Hampshire Supreme Court's decision conflicts with a series of decisions by the California Court of Appeals in *Farmer Bros. Co. v. Franchise Tax Bd.*, 134 Cal. Rptr. 2d 390 (Cal. App. 2003), *rev. denied* (Cal. Aug. 27, 2003); *Ceridian Corp. v. Franchise Tax Bd.*, 102 Cal. Rptr. 3d 41 (Cal. App. 2000); and *General Motors v. Franchise Tax Bd.*, 16 Cal. Rptr. 3d 41 (Cal. App. 2004), *aff'd in part and rev'd in part on other grounds*, 47 Cal. Rptr. 3d 233 (Cal. 2006). Petition at 12. The California Court of Appeals, however, *citing Du Pont*, recently upheld a limited deduction for dividends received from foreign corporations while allowing a full deduction for dividends received from domestic corporations in the context of a water's edge combined report. *Fujitsu IT Holdings, Inc. v. Franchise Tax Bd.*, 15 Cal. Rptr. 3d 473 (Cal. App. 2004). The California Appellate Court held that California's water's edge method of apportionment of income did not facially discriminate against foreign commerce because it had the same kind of "taxing symmetry" present in *Du Pont*. *Fujitsu*, 15 Cal. Rptr. 3d at 489. Other courts have also relied on the reasoning of *Morton Thiokol* and *Du Pont* in finding that the taxation of foreign-source income is not invalid under *Kraft* where the consolidated or combined reporting method is used, although some have invalidated taxing regimes as discriminatory for other

reasons not applicable here. *See Hutchinson Technology v. Com'r of Revenue*, 698 N.W.2d 1, 17 (Minn.2005) ("But in contrast to the circumstances in *Morton Thiokol* and *Du Pont*, which involved taxes imposed by the same state for which the dividend-received deduction was intended to compensate, the additional tax liability for which the dividend-received deduction would compensate here is *federal* tax liability"); *Emerson Elec. Co. v. Tracy*, 90 Ohio St.3d 157, 735 N.E.2d 445, 448-49 (2000) (recognizing the validity of the "taxing symmetry" principle where domestic and foreign subsidiaries are both taxed once); *Conoco, Inc. v. Taxation & Revenue Dept.*, 122 N.M. 736, 931 P.2d 730, 735 (1996) (same), *cert. denied*, 521 U.S. 1112 (1997); *Bernard Egan & Co. v. State, Dept. of Rev.*, 769 So.2d 1060, 1061 (Fla. Dist. Ct. App. 2000) (upholding similar taxing regime as constitutional because domestic and foreign subsidiary income was equally treated under the consolidated reporting method), *cert. denied*, 534 U.S. 995 (2001); *Caterpillar, Inc. v. Commission of Revenue*, 568 N.W.2d 695, 701 (Minn. 1997) (adopting similar analysis as applied to foreign interest and royalty payments), *cert. denied*, 522 U.S. 1112 (1998).

Petitioner also claims that the North Dakota Supreme Court, in *D.D.I., Inc. v. State ex rel. Clayburgh*, 657 N.W.2d 228 (N.D. 2003), struck down a dividends received deduction that is "identical" to New Hampshire's dividends received deduction finding it discriminatory in violation of the Commerce Clause. Petition at 12. North Dakota's dividends received deduction is not identical to New Hampshire's dividend received deduction. In fact, they bear little resemblance to each other. The New Hampshire dividends received deduction only applies to dividends from subsidiaries to parent corporations that own a minimum of 80% of the subsidiaries' stock.

General Electric (NH), Petitioner's App. at 6a-7a. North Dakota's dividend received deduction applies to any dividend received by a corporation regardless of the percentage of stock ownership. *D.D.I.*, 657 N.W.2d at 230. This distinction is significant because New Hampshire's taxation of foreign dividends is predicated upon the foreign subsidiary being part of the unitary business conducted in New Hampshire. In order for a foreign subsidiary to be unitary with any subsidiary there must be a unity of ownership. N.H. Rev. Stat. Ann. § 77-A:1, XIV. The New Hampshire Supreme Court correctly concluded that *D.D.I.* was inapposite because it did not consider a dividend received deduction in the context of a water's edge combined reporting tax regime.

The lower court was also correct in distinguishing the line of California cases that began with *Ceridian Corp. v. Franchise Tax Bd.*, 85 Cal. App. 4th 875, 883 (2000) on which Petitioner relies. The deduction at issue in *Ceridian* is also distinguishable from N.H. Rev. Stat. Ann. § 77-A:4, IV because unlike the deduction at issue here, which allows a deduction regardless of the source of the income, N.H. Rev. Stat. Ann. § 77-A:4, IV, it allowed dividends to be deducted only if they were paid from "California sources[,]" *Ceridian*, 85 Cal. App. 4th at 883. The *Ceridian* court found the deduction to be like that in *Fulton* because it disallowed a deduction based on the amount of property and employees that the dividend-declaring insurer had in another state. *Ceridian*, 85 Cal. App. 4th at 887. Therefore, it favored domestic competitors over foreign, and tended to discourage domestic corporations from having property or employees in other states. *Ceridian*, 85 Cal. App. 4th at 887. No such favoritism occurs under the dividends received deduction at issue here. The court

below correctly applied this Court's standards for determining discrimination under the Foreign Commerce Clause, and the decisions of other state appellate courts are consistent with it.

Petitioner's reliance on the other California case, *Farmer Bros. Co. v. Franchise Tax Bd.* is also unhelpful to its claim. 134 Cal. Rptr. 2d 390 (Cal. App. 2003), *rev. denied* (Cal. Aug. 27, 2003). The tax statute in that case was like the one struck down in *Fulton*. In *Farmer Bros.*, the State of California allowed a reduced dividend tax "to the extent such dividends are 'paid from income from California sources,'" so to the extent that a dividend-paying corporation had a larger share of its sales, property and/or payroll in California, the taxpayer could deduct a larger percentage of the dividends it received, but no deduction was allowed for dividends generated from business outside of California. *Farmer Bros.*, at 396, 399. Relying on *Fulton* (where North Carolina reduced a tax "in direct proportion to the amount of business the owned corporation did within the state's borders"), the court held that the statute was facially discriminatory because it favored dividend-paying corporations doing business in California and paying California taxes over dividend-paying corporations which did no business in California and paid no taxes in California. *Id.* at 398-99. The deduction was facially discriminatory under the Commerce Clause because it discriminated between transactions on the basis of an interstate element. *Id.* In contrast, no such discrimination occurs in the case at bar because the deduction is allowed regardless of the source of income. N.H. Rev. Stat. Ann. § 77-A:4, IV.

General Motors v. Franchise Tax Bd. is also unhelpful to GE's claim because it addresses the same California

statutory scheme in *Farmer Bros.*, and it therefore relies on *Farmer Bros.* in finding that the statute is facially discriminatory. *General Motors v. Franchise Tax Bd.*, 16 Cal. Rptr. 3d 41, 56 (Cal. App. 2004), *aff'd in part and rev'd in part on other grounds*, 47 Cal. Rptr. 3d 233 (noting that the California Supreme Court denied review of the *Farmer Bros.* decision and that *Farmer Bros.* is dispositive). Consequently, the court in *General Motors* agreed with the *Farmer Bros.* court's holding that the statute was facially discriminatory, noting that the Court of Appeal "rejected all of the arguments the FTB presents to us and concluded that the tax, as computed with respect to section 24402, violates the commerce clause." *General Motors*, 16 Cal. Rptr. 3d at 56.

III. Petitioner's Claim Is Purely Hypothetical, And It Has Not Been Harmed.

The Court should not review this case because Petitioner has not been harmed in any way. Its entire case is based on its creation of a hypothetical possibility that a foreign subsidiary could avail itself of a deduction that is afforded to prevent double taxation. The Court has stated that discrimination "is a practical conception" and the Court "must deal in this matter, as in others, with substantial distinctions and real injuries." *Gregg Dyeing Co. v. Query*, 286 U.S. 472, 481 (1932). The power of this Court to invalidate a state law should not be invoked solely on the basis of a hypothetical possibility.

Not only is Petitioner's claim based solely on a hypothetical, but it has distorted Commerce Clause jurisprudence by couching its claim as one of facial discrimination to avoid having to demonstrate any injury. Although this

Court has declared that state laws discriminating on their face are "virtually per se invalid[,]" *Fulton*, 516 U.S. at 331 (citations omitted), it has done so in order to relieve claimants from the difficulty of proving the extent of the effect of a facially discriminatory statute. *See Bacchus Imports Ltd. v. Dias*, 468 U.S. 263, 269 (1984). This Court has never ruled that a statute should be invalidated without any demonstrable harm. Petitioner has not demonstrated any harm.

N.H. Rev. Stat. Ann. § 77-A:4, IV is not discriminatory on its face. It treats those engaged in foreign commerce and domestic commerce equally. The New Hampshire Constitution extends the same protection against double taxation to foreign corporations that it provides to New Hampshire businesses. A statute that is discriminatory on its face would grant the deduction for domestic corporations and deny it to foreign corporations. Thus, it is not discrimination that is the source of the Petitioner's complaint, but equal treatment under New Hampshire's tax law. Because Petitioner can conceive of a possibility in which one of its foreign subsidiaries might avail itself of this protection against double taxation by conducting a portion of its business in New Hampshire does not render the statute unconstitutional on its face. As the Kansas Supreme Court ruled in *Morton Thiokol*, a taxing scheme is not unconstitutional if any hypothetical can be devised which results in differential treatment. *Morton Thiokol*, 254 Kan. at 37. This Court has "never deemed a hypothetical possibility of favoritism to constitute discrimination that transgresses constitutional commands" and consequently, Petitioner's claims fail. *General Motors Corp. v. Tracy*, 519 U.S. 278, 311 (1997).

If New Hampshire's dividend received deduction speaks to foreign commerce at all, it sends the message that if foreign corporations choose to do business in New Hampshire, they will not be subject to double-taxation. It does not impose a greater burden on foreign commerce with no operations in New Hampshire. It only protects against unfair taxation. A non-discriminatory state protection against unfair taxation does not violate the United States Constitution.

CONCLUSION

For the foregoing reasons, the Petition for a Writ of *Certiorari* should be denied.

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